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4 IN RE EX PARTE APPLICATION OF JSC  
5 COMMERCIAL BANK PRIVATBANK,  
6  
7

Applicant.

Case No. [21-mc-80216-VKD](#)

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12  
**ORDER GRANTING EX PARTE  
APPLICATION FOR DISCOVERY  
PURSUANT TO 28 U.S.C. § 1782**

13  
14 Re: Dkt. No. 1  
15  
16  
17

18 Applicant JSC Commercial Bank PrivatBank (“PrivatBank”) seeks an order pursuant to 28  
19 U.S.C. § 1782 authorizing service of a subpoena on Google LLC (“Google”) for evidence to be  
20 used in pending litigation in the United Kingdom. Dkt. No. 1. For the reasons stated below, the  
21 Court grants the application.

22 **I. BACKGROUND**

23 According to the application, PrivatBank is the plaintiff in a civil action against Gennadiy  
24 Borisovich Bogolyubov and several other defendants in the High Court of Justice, Business and  
25 Property Courts of England and Wales in the United Kingdom, Case No. BL-2017-000665 (the  
26 “English Action”). Dkt. No. 2 at 3. PrivatBank contends that that Mr. Bogolyubov and the other  
27 defendants misappropriated approximately \$1.91 billion from PrivatBank while it was under their  
28 ownership and control as part of scheme to defraud the bank and its stakeholders. *Id.* at 2.

29 During discovery in the English Action, Mr. Bogolyubov disclosed that had three email  
30 accounts with Google that he claimed he could not access because no longer had the passwords  
31 and could not remember any of the alternative information necessary to access the accounts  
32 through Google’s usual account recovery procedures. *Id.* PrivatBank represents here, and has

United States District Court  
Northern District of California

1 represented to the English court, that information already obtained suggests that these email  
2 accounts are associated with Mr. Bogolyubov and likely contain evidence relevant to the English  
3 Action. *See* Dkt. No. 2 at 5-6; Dkt. No. 3-3 (Ex. T) at ECF pp. 126-27.

4 At the English court's direction, Mr. Bogolyubov signed a statement, or "mandate,"  
5 identifying three email accounts, attesting to his ownership of the accounts, and consenting to  
6 disclosure of the contents of each account to his counsel in the English Action. Dkt. No. 2 at 6.  
7 The mandate states in relevant part:

8 To Google:

9 I, Gennadiy Borisovich Bogolyubov, am the subscriber/owner of the  
10 accounts:

- 11
- 12 • [gennadiy.bb@gmail.com](mailto:gennadiy.bb@gmail.com);
  - 13 • [dn200162bgb@gmail.com](mailto:dn200162bgb@gmail.com); and
  - 14 • [gbb2001@gmail.com](mailto:gbb2001@gmail.com)

15 I hereby consent to the disclosure of all data contained in or relating  
16 to my accounts of whatever nature (including, but not limited to,  
17 emails and documents (including deleted items), account/subscriber  
18 information and metadata), to the law firm of Enyo Law LLP  
19 ("Enyo Law"). . . .

20 I further consent to your providing a copy of all data contained in or  
21 relating to my accounts of whatever nature to Enyo Law as soon as  
22 possible, and to follow any and all further instructions from Mr.  
23 George Maling concerning access to or copies of data in or relating  
24 to my accounts.

25 I further consent to your providing all such data (including contents  
26 of communications) to Enyo Law pursuant to 18 U.S. Code  
27 §§ 2702(b)(3) and 2702(c)(2). . . .

28 [signed "Bogolyubov" June 29, 2021]

Dkt. No. 3-3 (Ex. Y) at ECF p. 154.

PrivatBank now seeks permission to serve a subpoena addressed to Google for the  
following documents:

1. All emails associated with gennadiy.bb@gmail.com, dn200162bgb@gmail.com, and/or  
gbb2001@gmail.com (the "gmail accounts"), including but not limited to emails that  
were sent from or received by any of the gmail accounts, draft emails associated with

any of the gmail accounts, or deleted emails associated with any of the gmail accounts.

2. All data contained in or relating to the gmail accounts of whatever nature (including, but not limited to, emails and documents (including deleted items), account/subscriber information and metadata).

3. All other data contained in or relating to the gmail accounts of whatever nature, including but not limited to information sufficient to show when, on what dates, and by which persons or IP addresses any of the gmail accounts were last accessed.

Dkt. No. 1-2 at ECF p. 5. In addition, PrivatBank asks the Court to order that all responsive documents and information be provided only to Mr. Bogolyubov's legal counsel in the English action, Mr. Maling of Enyo Law LLP. Dkt. No. 1-1.

## II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 1782, a district court may order the production of documents or testimony for use in a foreign legal proceeding, unless the disclosure would violate a legal privilege. 28 U.S.C. § 1782(a); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246-47 (2004). The statute may be invoked where: (1) the discovery is sought from a person residing in the district of the court to which the application is made; (2) the discovery is for use in a proceeding before a foreign tribunal; and (3) the applicant is a foreign or international tribunal or an "interested person." *Intel*, 542 U.S. at 246.

A district court is not required to grant an application that meets the statutory criteria, but instead retains discretion to determine what discovery, if any, should be permitted. *Id.* at 264. In exercising that discretion, the court considers several factors:

- (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding";
- (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";
- (3) whether the discovery request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country"

1 or the United States”; and

2 (4) whether the discovery requested is “unduly intrusive or burdensome.”

3 *Id.* at 264-65.

4 A district court’s discretion is guided by the twin aims of § 1782: providing efficient  
5 assistance to participants in international litigation and encouraging foreign countries by example  
6 to provide similar assistance to our courts. *Schmitz v. Bernstein Liebhard & Lifshitz LLP*, 376  
7 F.3d 79, 84 (2d Cir. 2004). The party seeking discovery need not establish that the information  
8 sought would be discoverable under the governing law in the foreign proceeding or that United  
9 States law would allow discovery in an analogous domestic proceeding. *See Intel*, 542 U.S. at  
10 247, 261-63.

11 Applications brought pursuant to 28 U.S.C. § 1782 typically are considered on an *ex parte*  
12 basis, since ““parties will be given adequate notice of any discovery taken pursuant to the request  
13 and will then have the opportunity to move to quash the discovery or to participate in it.”” *IPCom*  
14 *GmbH & Co. KG v. Apple, Inc.*, 61 F. Supp. 3d 919, 922 (N.D. Cal. 2014) (quoting *In re Republic*  
15 *of Ecuador*, No. C-10-80225 MISC CRB (EMC), 2010 WL 3702427, at \*2 (N.D. Cal. Sept. 15,  
16 2010)). “Consequently, orders granting § 1782 applications typically only provide that discovery  
17 is ‘authorized,’ and thus the opposing party may still raise objections and exercise its due process  
18 rights by challenging the discovery after it is issued via a motion to quash, which mitigates  
19 concerns regarding any unfairness of granting the application *ex parte*.” *In re: Ex Parte*  
20 *Application Varian Med. Sys. Int’l AG, Applicant*, No. 16-mc-80048-MEJ, 2016 WL 1161568, at  
21 \*2 (N.D. Cal. Mar. 24, 2016).

22 Unless the district court orders otherwise, the discovery authorized by the court must be  
23 obtained in accordance with the Federal Rules of Civil Procedure. 28 U.S.C. § 1782(a); *In re*  
24 *Letters Rogatory from Tokyo Dist. Prosecutor’s Office, Tokyo, Japan*, 16 F.3d 1016, 1020 (9th  
25 Cir. 1994).

26 **III. DISCUSSION**

27 **A. Statutory Requirements**

28 PrivatBank’s application satisfies the statutory requirements of 28 U.S.C. § 1782(a). First,

1 the subpoena seeks discovery from Google, which has its headquarters in Mountain View,  
2 California, within the Northern District of California. Dkt. No. 2 at 8. Second, PrivatBank  
3 requests this discovery for use in pending proceedings before a court in the United Kingdom, a  
4 foreign tribunal. Third, as a party in the U.K. proceedings, PrivatBank is an interested person  
5 within the meaning of the statute.

6 **B. Intel Factors**

7 Even if the Court has the authority to grant PrivatBank's § 1782 application, that does not  
8 mean the Court is required to do so. *Intel*, 542 U.S. at 247. In determining whether judicial  
9 assistance under § 1782 is appropriate, the Court must consider the additional *Intel* factors.

10 **1. Participation of respondent in the foreign proceeding**

11 Although this factor addresses whether the person from whom discovery is sought is a  
12 party to the foreign proceeding, "the key issue is whether the material is obtainable through the  
13 foreign proceeding." *In re Varian Med. Sys.*, 2016 WL 1161568, at \*3 (internal quotations and  
14 citation omitted).

15 According to the application, Google is not a party to the English Action, and the  
16 discovery sought by subpoena is located outside the jurisdiction of the foreign tribunal. Dkt. No. 2  
17 at 10. In these circumstances, the need for assistance pursuant to § 1782(a) is greater than it would  
18 be in circumstances where the foreign tribunal may order parties appearing before it or third  
19 parties within its jurisdiction to produce evidence. *Intel*, 542 U.S. at 264. The Court finds that  
20 this factor weighs in favor of the requested discovery.

21 **2. Receptivity of foreign tribunal to U.S. judicial assistance**

22 Under this factor, the Court considers "the nature of the foreign tribunal, the character of  
23 the proceedings underway abroad, and the receptivity of the foreign government or the court or  
24 agency abroad to U.S. federal-court judicial assistance." *Intel*, 542 U.S. at 264. "This factor  
25 focuses on whether the foreign tribunal is willing to consider the information sought." *In re*  
26 *Varian Med. Sys.*, 2016 WL 1161568, at \*4. "[I]f there is reliable evidence that the foreign  
27 tribunal would not make any use of the requested material, it may be irresponsible for the district  
28 court to order discovery, especially where it involves substantial costs to the parties involved." *Id.*

1 (internal quotations and citations omitted). Courts have denied requests for discovery where the  
2 foreign tribunal or government expressly says it does not want the U.S. federal court's assistance  
3 under § 1782. *See, e.g., Schmitz*, 376 F.3d at 84-85 (affirming the denial of discovery where the  
4 German government expressly objected to the information sought due to concerns that it would  
5 jeopardize an ongoing German criminal investigation, as well as German sovereign rights); *In re*  
6 *Ex Parte Appl. of Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1040-41 (N.D. Cal. 2016) (concluding  
7 that this *Intel* factor weighed heavily against discovery where the Korean Fair Trade Commission  
8 filed an amicus brief stating that it had no need or use for the requested discovery).

9 Here, PrivatBank observes that the English court expressly directed Mr. Bogolyubov to  
10 provide a mandate indicating his consent to Google's disclosure of the documents and information  
11 PrivatBank seeks, and that the English court further directed PrivatBank to afford Mr. Bogolyubov  
12 an opportunity to review and object to PrivatBank's § 1782 application in advance of its filing.  
13 Dkt. No. 2 at 10. PrivatBank says that Mr. Bogolyubov has raised no objections. *Id.* In addition,  
14 PrivatBank argues that other district courts in several other cases have recognized that English  
15 courts have been receptive to discovery obtained by means of a § 1782 application. *See id.* (citing  
16 cases).

17 The Court concludes that this factor weighs in favor of authorizing service of the  
18 subpoena.

19 **3. Circumvention of proof-gathering restrictions**

20 Under this factor, the Court considers whether PrivatBank's request for discovery  
21 "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a  
22 foreign country or the United States." *Intel*, 542 U.S. at 265. "A perception that an applicant has  
23 side-stepped less-than-favorable discovery rules by resorting immediately to § 1782 can be a  
24 factor in a court's analysis." *In re Varian Med. Sys.*, 2014 WL 1161568, at \*5 (quoting *In re*  
25 *Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2013 WL 183944, at \*3 (N.D. Cal.  
26 Jan. 17, 2013)). Courts have found that this factor weighs in favor of discovery where there is  
27 "nothing to suggest that [the applicant] is attempting to circumvent foreign proof-gathering  
28 restrictions." *In re Google, Inc.*, No. 14-mc-80333-DMR, 2014 WL 7146994, at \*3 (N.D. Cal.

1 Dec. 15, 2014); *see also In re Eurasian Nat. Res. Corp. Ltd.*, No. 18-mc-80041-LB, 2018 WL  
2 1557167, at \*3 (N.D. Cal. Mar. 30, 2018) (finding that the third *Intel* factor weighed in favor of  
3 discovery where there was “no evidence” of an attempt to circumvent foreign proof-gathering  
4 restrictions or policies).

5 Here, PrivatBank represents no restrictions or policies of the English court that would limit  
6 the gathering of the specific evidence PrivatBank seeks here, as that court has expressly approved  
7 PrivatBank’s efforts to obtain the evidence by means of a § 1782 application. Dkt. No. 2 at 11.  
8 Moreover, PrivatBank emphasizes that it seeks an order requiring Google to disclose responsive  
9 documents and information from Mr. Bogolyubov’s own email accounts to Mr. Bogolyubov’s  
10 own counsel so that those materials may be reviewed and produced in accordance with the English  
11 court’s ordinary discovery procedures. *Id.*

12 The Court concludes that this factor also weighs in favor of authorizing service of the  
13 subpoena.

14 **4. Unduly burdensome or intrusive discovery**

15 Under this factor, the Court considers whether the discovery is sought is “unduly intrusive  
16 or burdensome.” *Intel*, 542 U.S. at 265.

17 PrivatBank seeks the production all documents and information “contained in or relating  
18 to” the three email accounts identified in the application, without limitation as to date or subject  
19 matter. Dkt. No. 1-2 at ECF p. 5. Although the scope of such discovery is very broad, it appears  
20 warranted here, as the purported goal is to obtain access to the contents of accounts held by Mr.  
21 Bogolyubov so that he may review and produce responsive materials from those accounts. The  
22 record before the Court does not permit a determination as to whether such production will be  
23 unduly burdensome for Google. However, as Google will have the opportunity to object to these  
24 document requests following service of the subpoena, the Court concludes that this factor weights  
25 in favor of authorizing service of the subpoena.

26 **C. Stored Communications Act**

27 As PrivatBank acknowledges, its application implicates the provisions of the Stored  
28 Communications Act (“SCA”), 18 U.S.C. §§ 2701-2703. *See* Dkt. No. 2 at 12. The SCA

prohibits service providers, like Google, from disclosing the contents of an account holder's electronic communications, unless one of several exceptions applies. 18 U.S.C. § 2702(a)(1), (a)(2); 18 U.S.C. § 2702(b)(1)-(9). One such exception is that a service provider may disclose the contents of an account holder's electronic communications with the "lawful consent" of the account holder. 18 U.S.C. § 2702(b)(3). The statue does not define "lawful consent" or describe how it may be established.

The application reflects that Mr. Bogolyubov has expressly consented to disclosure of the materials within the scope of the subpoena. Dkt. No. 3-3 (Ex. Y) at ECF p. 154. He asserts that he is the account holder, and this representation is consistent with other information in the record before the Court. *See, e.g.*, Dkt. No. 2 at 5-6; Dkt. No. 3-3 (Ex. T) at ECF pp. 126-27. However, Mr. Bogolyubov apparently attempted to obtain access to the three email accounts using Google's account recovery procedures but was unsuccessful. Dkt. No. 2 at 5. The record does not clearly reveal why Google refused to allow him access to these accounts, or whether Google has information suggesting that Mr. Bogolyubov is not, in fact, the holder of these email accounts.

In these circumstances, the Court concludes that PrivatBank has made a sufficient showing that Mr. Bogolyubov is the holder of the three email accounts and that he has provided the consent required by the SCA. Google will have the opportunity to move to quash the subpoena if it contends otherwise, and if it believes the SCA prohibits disclosure of the subpoenaed materials.

#### IV. CONCLUSION

PrivatBank's application meets the statutory criteria for an order authorizing service of the proposed subpoena. In addition, the factors that inform the Court's exercise of its discretion under *Intel* also favor authorizing service of the subpoena.

Accordingly, the Court authorizes service of the proposed subpoena on Google. All documents and information responsive to the subpoena shall be produced only to the law firm of Enyo Law LLP ("Enyo"), Mr. Bogolyubov's legal counsel, attention George Maling (and not to Hogan Lovells, the Bank, or any other representatives). Mr. Maling's address is 1 Tudor Street, London, EC4Y 0AH, his email address is george.maling@enyolaw.com, and his telephone number is +44 203 837 1604. PrivatBank shall comply with Rule 45 of the Federal Rules of Civil

1 Procedure in fixing the date for Google's compliance with the subpoena.

2 This order does not foreclose Google from moving to quash or to modify the subpoena  
3 following service. At the time of service of the subpoena, PrivatBank must also serve a copy of  
4 this order on Google.

5 **IT IS SO ORDERED.**

6 Dated: September 24, 2021

7   
8 VIRGINIA K. DEMARCHI  
9 United States Magistrate Judge